No. 98 Y.

Brief of Rives for D. C.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1900.

The Louisville and Nashville Railroad Company, Plaintiff in Error.

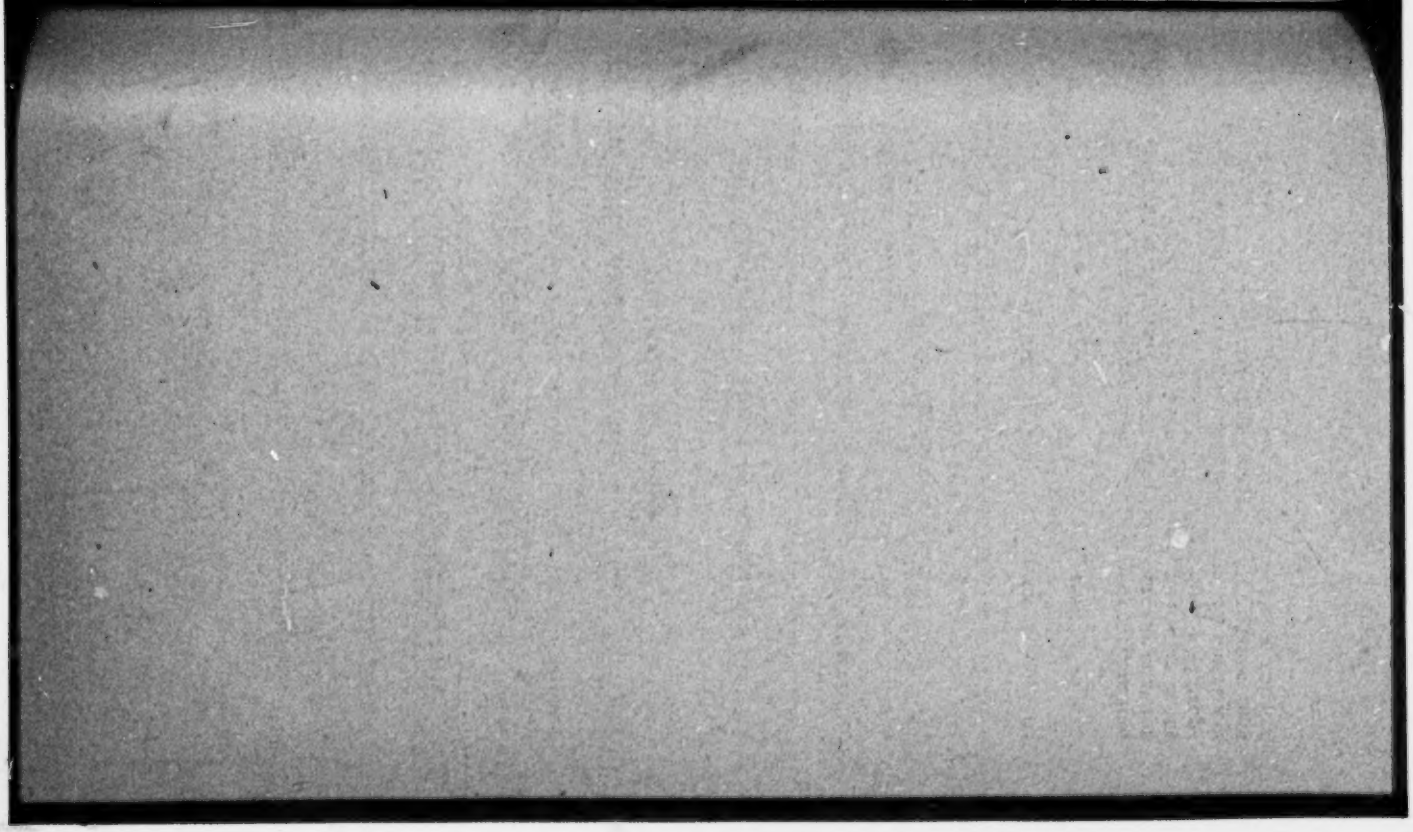
vs.

The Commonwealth of Kentucky.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

Brief for Defendant in Error.

H. W. RIVES, of Counsel for Def't in Error.



Louisville and Nashville Railroad Company.	Plaintiff in Error
vs.	
The Commonwealth of Kentucky.	Defendant in Error

BRIEF FOR DEFENDANT IN ERROR.

The Louisville and Nashville Railroad Company, a coporation operating a railroad under charter granted by the legislature of Kentucky, was, upon the recommendation of the State Railroad Commission, indicted for violating section 218 of the constitution of that state. and section 820 of the Kentucky Statutes, which are commonly known as the Long and Short Haul law of Kentucky. The trial resulted in a judgment of conviction and a fine of $300.00, which, on appeal, was affirmed by the Court of Appeals.

From that judgment of affirmance a writ of error has been prosecuted to this court, and the question here presented for consideration is the alleged invalidity of the Long and Short Haul law of Kentucky, as being repugnant to the Federal Constitution.

The questions presented by the assignment of errors are:

1. That section 218 of the constitution of Kentucky, as construed by the courts of that state, deprives the carrier of his property without due process of law, and denies to it the equal protection of the law;

2. That it impairs the obligation of the charter contract between the Plaintiff in Error and the Commonwealth of Kentucky; and,

3. That it unlawfully interferes with commerce among the states.

The section of the Kentucky Constitution referred to is as follows:

"SEC. 218. It shall be unlawful for any person or corporation, "owning or operating a railroad in this state, or any common "carrier, to charge or receive any greater compensation in the "aggregate for the transfortation of passengers, or of prop- "erty of like kind, under substantially similar circumstances "and conditions, for a shorter than for a longer distance, over "the same line, in the same direction, the shorter being included

"in the longer distance: but this shall not be construed as "authorizing any common carrier, or person or corporation, "owning or operating a railroad in this state, to receive as great "compensation for a shorter as for a longer distance; *Provided*, "That upon application to the Railroad Commission, such "common carrier, or person or corporation, owning or operating "a railroad in this state, may in special cases, after investigation "by the Commission, be authorized to charge less for longer "than for shorter distances, for the transportation of passengers "or property; and the Commission may, from time to time, "prescribe the extent to which such common carrier, or person "or corporation, owning or operating a railroad in this state, "may be relieved from the operation of this section."

Section 820 of the Kentucky Statutes provides a penalty of not less than one, nor more than five hundred dollars for a violation of this provision, and imposes upon the Railroad Commission the duty of investigating the grounds of complaints made to them, and, if they fail, after investigation, to exonerate the carrier, they are required to report the facts to the proper grand jury that the penalties may be imposed.

The indictment in this case charges a violation of the constitution in that Plaintiff in Error demanded $1.55 per ton for the transportation of coal from Altamont, Kentucky, to Lebanon, Kentucky, a distance of about 80 miles, while its rate from Altamont, through Lebanon, to Louisville, about 147 miles, was only $1.00 per ton; and from Altamont to Elizabethtown, through Lebanon, the rate was $1.30 per ton. The whole route in each case, was within the state, and the Railroad Commission, in its order refusing to exonerate, expressly reserved the right "to suspend the operation of this order should said Company "(Plaintiff in Error) reduce its rates on said commodity from "said points of shipment to Lebanon, Kentucky, such reduced "rates to be approved by this board."

Plaintiff in Error declining to change its rates, or to apply to the Commission for approval of any lower rate to Lebanon, the indictment and conviction in the Marion Circuit Court followed such refusal.

ARGUMENT.

This Court will not question the construction of the Kentucky constitution as declared by the Court of Appeals of Kentucky, (*C. M. & St. P. R'y Co vs. Minn. 134 U. S. 418*), nor will it undertake to correct any supposed error of that court in applying a valid constitutional or statutory provision to the facts of the case before it: (*Central Land Co. vs Laxdely 159 U. S. 103*)

The judgment must be affirmed unless the provision of the Kentucky Constitution, on which the prosecution is based, be found repugnant to some provision of the Constitution or laws of the United States. If due process of law has been provided,

and the constitution, as construed by the Court of Appeals of Kentucky, would not, when fairly applied by the proper tribunals, deprive any carrier of the equal protection of the laws, this court will not assume to correct a merely erroneous judgment of those tribunals, and no such question can be raised in the case at bar in this court.

It is not, by any means, conceded by Defendant in Error, that any of the proceedings of the State tribunals were erroneous, but in view of the fact that the record is encumbered with a mass of offered testimony that was excluded and we think properly, by the trial court, and that an effort will probably be made in this court, as it was in the court of Appeals of Kentucky, to have this offered testimony considered as conclusive because uncontradicted, it may not be amiss to suggest that the Commonwealth was not called upon in the trial court to rebut or to contradict evidence that was not heard by the jury. The testimony was rejected by the trial court, because it was offered before the wrong tribunal, the Railroad Commission having exclusive jurisdiction to hear and consider it, under an application for exoneration from the constitutional enactment. It is significant that Plaintiff in Error did not offer the record of the evidence on *both sides* of the question, heard by the Railroad Commission on its investigation, from which it must be assumed that the Commission fairly and justly reached the conclusion that the discrimination between Lebanon and Louisville was unreasonable and not justified, to the extent claimed by Plaintiff in Error, by any circumstances of competition at Louisville, and that for this reason the Commission refused to sanction the difference in charges as made. In fact, the Commission in effect indicated that a reasonable excess in charge for the shorter haul would be allowed, if Plaintiff in Error would submit to the law of the State, while the extent of the excessive charge on which Plaintiff in Error insisted was unreasonable.

As construed by the Court of Appeals, section 218 of the Constitution of Kentucky was designed to take from the managers of railroad companies the exclusive right of deciding for themselves and for the public what difference in rates between different localities will be reasonable. It was the aim of the Constitution to require the railroads to treat all localities fairly and with equality. "However honest and faithful railroad man-"agers may be, they necessarily look first to the interests of "those they serve, and no principle of constitutional law is "violated when the State, which has created these agencies for "the public service, creates an impartial tribunal to prevent "their great powers from being used to build up certain favored "localities at the expense of others.... To hold that only railroad "men understand rates, or that they shall be allowed *alone* to fix "the rates, and that no tribunal can review their decision as to

"what rates are reasonable is to put in their hands a power "dangerous to the welfare of the community, and utterly out of "keeping with the doctrine that they are public agencies." (Opinion of Court of Appeals, Record pp. 83-84.) The Constitutional Convention, exercising the sovereignty of the State, in adopting section 218, declares that when all conditions of transportation service, except distance, are identical the carrier shall not charge one locality more for a shorter than another for a longer distance; it *does not fix a rate*, nor abridge the right of the carrier to charge a rate that will be sufficient to secure a reasonable profit on its investment, and reasonable compensation for its services to the public; the fixing of the rates for transportation is left to the carrier, under the general restriction that they must be reasonable; but when a rate is fixed as reasonable for a longer distance point, then, regardless of the amount so fixed by the carrier itself, an excess over that rate is declared to be an unreasonable and unjust discrimination against the shorter distance point, when all other considerations that affect the cost of the service are the same. It is not that the Constitution fixes the price of the loaf, nor that it requires the price to be proportioned to size, but because it says to the carrier, "You "shall not sell a half loaf for more than you charge for a whole "loaf of the same kind of bread," that Plaintiff in Error complains of an unreasonable interference with its rights of property. As applied to the case at bar, the State declares that if the carrier for any cause, fixes, as reasonable a rate, of $1.00 per ton for the transportation of coal 147 miles, it shall not be heard to claim in any court that $1.55 per ton is reasonable for the transportation of the same article in the same manner, at the same time, for only 80 miles, over the same route, in the same direction.

It is difficult to understand upon what grounds, consistent with the right of the State to regulate at all, this exercise of the police power can be considered as a departure form "due process of law," as "taking private property for public use without compensation," as depriving a carrier of the "equal protection of the laws," or as violating any restriction imposed by the Federal Constitution upon the exercise of sovereignty by the State.

This general regulation, so plainly just and reasonable, might in some special cases, seem to result in unnecessary hardship, as every police regulation will; but can it be declared, as a principle of law, that a court will substitute its standard of reasonableness, in any case, for that of the legislature, and even of the framers of our constitution, and refuse to enforce the plain requirements of the law for that reason alone? The wisdom or expediency of the law is not to be determined by the court, but by the legislative department. The real question at issue is not the expediency of the law but the power of the State to enact the law, and if the power exists the courts must enforce the law whatever

may be the individual views of the court as to its wisdom, or as to the soundness of the public policy indicated by the legislature. *Brass vs North Dakota, 153 U. S. 391.*

It may be possible that, in a particular case, the surrounding conditions will be so abnormal that the carrier could not continue its business without violating the plain rule of equality so enacted, but even in such a case, could a court rightfully assume the power to dispense with the law? If so, would not the same reasoning justify the court in permitting a carrier, in a special case, to charge in excess of a body of rates fixed by the legislature, and plainly reasonable for the service performed, yet insufficient in that particular instance to enable the carrier ro retrieve the effects of bad financial management?

The interests of the public are to be considered, and they are indeed paramount, for common carriers are given extraordinary privileges, including the right to subject private property for their uses, primarily for the benefit of the public, and whenever they cannot be profitably operated without oppressing the public, they should cease to operate at all.

In Covington & L. T. R. Co. vs. Sanford, 164 U. S. 578-598, this court said: "If the answer had not alleged, in substance. that the tolls prescribed by the act of 1890 were wholly "inadequate for keeping the road in proper repair and for "earning dividends, we could not say that the act was "unconstitutional merely because the company (as was alleged "and as the demurrer admitted) could not earn more than 4 "per cent. on its capital stock. It cannot be said that a cor-"poration operating a public highway is entitled, as of "right, and without reference to the interests of the public, to "realize a given per cent. upon its capital stock. When the "question arises whether the legislature has exceeded its con-"stitutional power in prescribing rates to be charged by a cor-"poration controlling a public highway, stockholders are not "the only persons whose rights or interests are to be consider-"ed. The rights of the public are not to be ignored.....The "public cannot be subjected to unreasonable rates in order "simply that stockholders may earn dividends. The legisla-"ture has the authority in every case, where its power has not "been restrained by contract, to proceed upon the ground that "the public may not rightfully be required to submit to un-"reasonable exactions for the use of a public highway estab-"lished and maintained under legislative authority. If a cor-"poration cannot maintain such a highway and earn dividends "for stockholders, it is a misfortune for it and them which the "constitution does not require to be remedied by imposing un-"just burdens upon the public."

In this case there is no pretense that plaintiff in error cannot comply with the constitutional provision, and at the same time,

so conduct its business as to make a profit on the investment; no pretense that obedience to the law would deprive it of any of its property; but only that the State cannot control it in its discrimination between localities, if a court of the State should be of opinion that the higher charge for the one locality would not, by itself, be unreasonably high. In other words that the State in the plenitude of its legislative power cannot declare a discrimination unjust nor even provide a special tribunal to determine the question, but is bound to establish a court, having exclusively judicial powers to determine the question of justice and reasonableness in all cases. It would seem that since the Railroad Commission cases, (*116 U. S. 307*) that have been so often cited by this court, and uniformly adhered to, the power of the State in this regard should be considered as settled. The police power is not judicial, but legislative; its exercise cannot be controlled by the court, unless it be plainly in violation of the settled principles of law that are recognized as inviolable under our system of government. In every case in which the attempted exercise of the power of legislative regulation of business affected with a public interest has been declared by this court to be inoperative, it has been upon the ground that it was "spoliation under the guise of regulation," that it deprived the owner of reasonable remuneration for the use of his property, and was, in effect, a destruction rather than a regulation of the use.

In a late case between the Plaintiff in Error and the Commonwealth of Kentucky (*161 U. S. 677-704*) this court said: "While there is no general reservation clause in the charter of "the L. & N. Co. we think, for the reasons stated in the "*Pearsall Case*, that under its police power, the people, in their "sovereign capacity, or the legislature as their representatives, "may deal with the charter of a railway corporation, so far as is "necessary for the protection of the lives, health and safety of its "passengers or the public, or for the security of property or the "conservation of the public interests; provided, of course, that "no vested rights are thereby impaired. In other words the "legislature may not destroy vested rights whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not. While the police power has been most frequently exercised with respect to matters which concern the "public health, safety or morals, we have frequently held that "corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection "of the public interests..... It has been too often held that "railways were public highways, and their functions were those "of the State, though their ownership was private, and that "they were subject to control for the common good, to be now

"open to question." See also *Smyth vs. Ames, 169 U. S. 466.*

And it would seem to be well settled that equal protection of the law is provided by "legislation, which, in carrying out a "public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated." *Barber vs. Connolly, 113 U. S. 27.*

When there has been question of the rates charged by common carriers, the matter of reasonableness has been left for judicial determination only where the legislature has failed to declare what is to be allowed as reasonable. After action by the legislature the power of the court is limited to enforcing the regulations enacted, or to an inquiry if they be so plainly unjust as to amount to spoliation, and therefore repugnant to the constitutional restriction. In every case the right of governmental control has been affirmed. Courts have no inherent power to control the legislature. The latter has plenary power to enact any laws deemed by it conducive to the good of the State: its discretion, in that regard, cannot be abridged or controlled by a coordinate branch of the government: the court is limited to the power of construing and enforcing the laws as enacted. It is only when the legislature has attempted a violation of some provision of the higher law, disregarded some restriction of its powers, expressly declared in the constitution, that the court in construing and enforcing the higher law, may declare the legislative act a nullity.

"Whatever is contrary to public policy or inimical to the "public interests is subject to the police power of the State, and "within legislative control, and in the exertion of such power "the legislature is vested with a large discretion, which, if exercised *bona fide*, for the protection of the public, is beyond "the reach of judicial inquiry." *L. & N. Ry. Co. vs. Commonwealth of Ky., 161 U. S. 677-704.*

Where the people of a State, in the exercise of their inherent powers of sovereignty, adopt a constitution, by which they distribute the powers of government among various tribunals created by them, the only restriction upon their power in that regard is that the government so formed shall be republican. They may commit to a single tribunal the exercise of administrative, judicial and ministerial functions, and may modify or even deny the right of trial by jury, without violating that provision of the Federal constitution requiring "due process of law." *166 U. S. 685. 163 U. S. 101, 160 U. S. 389.*

The regulation of its internal affairs is a matter exclusively within the power of the State, so long as it does not attempt to exercise any of the authority expressly prohibited to it by the Federal Constitution; and when an enactment is embodied in the organic law of the State, there can be no question of one department of the government encroaching upon another, but the

only inquiry open is whether the State as a complete sovereign entity, has been restricted by the higher law which limits its exercise of power only in so far as expressly declared.

If the State of Kentucky had declared that all railroad corporations created by it, and operating, as common carriers, lines of railroad between points within the State, shall charge for transportation of passengers or freight in proportion to the mileage traveled, without otherwise limiting the rates to be charged, does authority exist anywhere to declare such attempted regulation ineffective? If the State had required that, for transportation of passengers or freight, the charge should be proportioned to the actual service rendered by the carrier in the work of transportation, can it be that a power exists outside the State to declare such a regulation invalid? If so, the actual power of regulation left to the State would be a myth, a mere shadow, and the creatures of the State, in the fullness of their emancipation from governmental restraint, could defy their creators, and depend upon the strong arm of the Federal Government to sustain them.

The framers of the Kentucky Constitution, however, did not desire, though they had the power, to make of the long and short haul provision, an iron clad rule permitting of no exception. They realized the fact that cases might arise, where the force of competition, or other circumstances extraneous to the actual service rendered, but strongly affecting the general interests of the carrier, would seem to justify, without injury to the public, a somewhat greater charge for the shorter than for the longer distance.

The Legislature, meeting for a session of sixty days, once in two years, could not, from the nature of the subject, give that careful and intelligent consideration to existing conditions in every such case that would insure the carrier against unnecessary hardship and the public against imposition, and the courts as organized, would not have the time, if they had the special qualifications, for an investigation of commercial conditions, the details, of railroad management and expense, and all the various elements proper to be considered in rate making.

Whether the power of suspending the operation of the constitution, and providing a different and less exacting rule for a special case, be called legislative, judicial, or administrative, is unimportant in the case at bar. The Constitutional Convention had the power to establish a special court, or a special legislature to exercise the powers of sovereignty in such cases, and the vesting of such authority in the Railroad Commission was the act of the State, and can not be questioned, unless indeed, the State would have been prohibited from granting to any tribunal the authority delegated to the Railroad Commission. The only restrictions that could apply to the Railroad Commis-

sion in the exercise of the powers conferred upon it by the constitution of Kentucky, are those applying to the State itself, for in the exercise of those powers it represents, not one department of the State government, but the State itself; its credentials come, not from the Legislature in an attempt to delegate part of its legislative power, but direct from the people who, in creating it, were exercising their inalienable right to establish their own form of government.

A large discretion is permitted to the Railroad Commission, but it is no more arbitrary than would be the discretion permitted to the legislature if the Constitution had declared that the legislature might in special cases allow a greater charge for the shorter than for the longer distance and prescribe the extent of such excess; nor the discretion that would have been vested in the legislature had the Constitution been silent on the subject of long and short hauls.

Any tribunal entrusted with the governmental powers necessary to a proper regulation of the business of common carriers may, and probably will in some cases, err in judgment, but it by no means follows that it acts arbitrarily, nor that, because of the fallibility of human instruments, the power must not be exercised. Such reasoning would abolish all legislative and judicial tribunals. As was well said by this court in *Reagan vs. Farmers' Loan and Trust Co., 154 U. S. 362:* "It is not to be "supposed that the Legislature of any State, or a commission "appointed under authority of any State, will ever engage in a "deliberate attempt to cripple or destroy institutions of such "great value to the community as the railroads, but will always "act with the sincere purpose of doing justice to the owners of "railroad property, as well as to other individuals."

The Kentucky Constitution creates a tribunal, calling it a Railroad Commission, and committing to it, exclusively, by express provision, the duty of relieving common carriers from any hardship that might result, in special cases, from an enforcement of the law enacted to protect the public against rapacity and oppression, and to prevent unequal burdens being imposed on different localities.

Whether this duty be the exercise of the pardoning power, and therefore executive, or of the legislative power in declaring a rule of conduct in special cases, need not be determined, for in neither case is the exercise of power to be arbitrary, but only "after investigation." Just as the Governor investigates before exercising his official discretion in pardoning the commission of a crime, and may pardon *on conditions*, or as the Legislature investigates through its committees and other agencies before exercising its discretion in declaring exceptions to the law in certain cases, so the Railroad Commission, in the exercise of the executive or legislative discretion committed to it,

exclusively, on one subject, makes its investigation and satisfies itself: in each case the result is final, and the act of the State, in the sense that there is no higher tribunal in the State to review it. It is not necessary to inquire whether the courts could, in any case, or by any kind of proceeding, grant relief to the public from an order of the Commission, induced by improper or corrupt motives, exonerating a carrier from the operation of Sec. 218 of the Constitution; but it can not be claimed, with any show of reason, that the court may exercise a power of exoneration never committed to it where, as in this case, the carrier had not made application to the constitutional tribunal.

The constitution does not, as contended by Plaintiff in Error, exclude, in all cases, a consideration of competition in fixing rates, but it in effect declares that competition, of itself, shall not justify the carrier in violating the rule of equality prescribed. The carrier is not to have exclusive control over the rates for the long and short haul, nor the sole right to determine when competition exists, and to what extent special rates, for that reason, may be given, but an impartial tribunal is established to act as umpire between the railroads and the people, to investigate in every case, to consider the ever-varying conditions that obtain, and to decide when and to what extent the carrier may justly disregard the rule as to long and short haul charges. This constitutional tribunal has the exclusive power to suspend the operation of a particular constitutional provision; a power not shared by Governor, Courts or Legislature; and this power is delegated to be exercised by it *for the benefit* of the *carrier alone*, and never in any case, to increase the rigor of the law.

For the sake of argument alone, it might be conceded that if the constitution had made an iron clad rule prohibiting a greater charge for a shorter than for a longer distance, it would have been unconstitutional because of the hardships possibly resulting therefrom to the carrier in special cases; but when the same section has provided a tribunal, and prescribed the manner in which upon application by the carrier, relief from any such resulting hardship or injustice may be obtained, there can be no excuse or justification for ignoring that tribunal, and claiming that the constitution is void because the court refused to entertain the jurisdiction that was denied to it, and all others, save the Railroad commission.

It was not contended by plaintiff in error that an observance of the long and short haul law would have deprived it of all compensation for the use of its property, but only that the discretion of a carrier to charge any amount it may deem reasonable, or to make any discrimination it may deem reasonable, cannot be interfered with by the state save through a judicial tribunal, and if the gist of its contenotion is understood by counsel, it claims the right in the first instance to judge for itself and to act

on its judgment, in spite of constitutionals, legislatures or courts.

No application to the Railroad commission for exoneration was made by plaintiff in error, but complaint is now made that the trial court, having before it evidence that the Commission had investigated and refused to exonerate, declined to reopen the question and itself assume the power to exonerate. Plaintiff in Error did not undertake to impeach the action of the Railroad Commission: did not claim that it had declined to give due consideration to all the evidence presented to it: did not hint at fraud, nor did it offer the record of the testimony, on both sides, heard and considered by the Commission.

The latter tribunal, and its action, were ignored by plantiff in error, and the Court was urged to declare that, to entrust the determination of such questions to a Railroad Commission in any case, even by constitutional enactment, is an undue interference with the property rights of a Common carrier.

The Railroad Commission was not clothed with the power to act, without notice to and a hearing from the carrier, in fixing a body of rates that would be final and beyond the power of a court to examine, as in the case of *C. M. & St. P. Ry. Co. vs. Minn. 134 U. S. 418.*, nor had it power to impose any burden upon the carrier: to decrease any body of rates fixed by the carrier; nor declare any restrictions upon the exercise of its rights. The constitution declared the restriction, and the power of the Commission is confined to giving relief to the carrier, after investigation, when such relief may be sought by the carrier. The extent of any adverse action within the power of the Commission is to refuse the relief sought; not to increase the restrictions, but to leave the constitution to be enforced as it was adopted by the people. The command to investigate, when applied to by the carrier, necessarily requires of the Commission a full and fair consideration of every fact and argument presented by the applicant that could affect the interests of the carrier and of the public. What better warrant of authority would there be for the tribunal appointed to hear and consider such an application, if it were called a High Court of Equity, a Legislature, a Board of Pardons, or any other name than a Rrilroad Commission? And on what ground can the carrier complain that there is no provision for process to compel or even to notify it to apply for relief, when the law itself notifies it that the tribunal is always open and ready to hear any application it may desire to make? It was never intended by the constitutional provision requiring "due process of law" to deprive a state, or even the legislative department of a state, of the privilege of prescribing different remedies, or different methods of procedure for the enforcement or protection of rights, nor to restrict the state in the exercise of its police power. It could

not have been intended to restrict the state in its power to regulate the charges of common carriers for services rendered to the public, and to provide for equality of treatment of individuals and localities. In matters of judicial cognizance "due process of law" requires notice, an opportunity to be heard, before a tribunal which proceeds upon inquiry and renders judgment only after full investigation: the forms of procedure in different classes of cases varying as the legislature may provide. In matters of legislative cognizance, the enactment will always be upheld unless plainly oppressive and unjust when judged by the fundamental principles underlying our system of jurisprudence.

The legislature cannot be deprived of the function of determining what is a reasonable, just, and necessary regulation of the conduct of any business affecting the public welfare: its discretion as to the measures that are needed for the public good, is plenary and exclusive, and cannot be restricted unless in a particular case it plainly is not an exercise of discretion, but an effort to destroy,——the equivalent of confiscation. "Due "process of law in each particular case means such an exertion, "of the powers of government as the settled maxims of law permit "and sanction and under such safeguards for the protection of in- "dividual rights as those maxims prescribe for the class of cases to "which the one in question belongs." *Cooley on Constitutional Lim. 356-357. C. B. & Q. R. Co. vs. Chicago, 166 U. S. 240. Missouri Pac. R. Co. vs. Humes, 115 U. S. 512.*

In the case at bar there can be no question as to equal protection of the law, for no discrimination is made against any railroad company and "there is no evasion "of the rule of equality where all companies are sub- "jected to the same duties and liabilities under similar cir- "cumstances?" *Missouri Pac. R. Co. vs. Humes, supra.*

With as little reason can it be claimed that Plaintiff in Error is deprived of any right "without due process of law." The enactment is a valid exercise of the police power of the state, and does not attempt to abridge the right of any railroad company to fix and charge a body of rates that would produce sufficient revenue to maintain its road and equipments and pay a reasonable income on the value of the property. *C. & L. T. Co vs. Sanford*, 164 U. S. 589. The real objection to the Constitution of Kentucky, on the part of Plaintiff in Error, seems to be that the carrier is prohibited from acting as judge, jury and legislature in its own case, where its interests conflict with those of the public, and that an impartial tribunal is provided to investigate and fix the limits within which it may discriminate as between localities on its line. The question is in fact simply as to the existence of the right of governmental control in the regulation of railroads.

INTERSTATE COMMERCE.

If the Interstate Commerce Law should be construed to prevent the enforcement of section 218 of the Constitution of Kentucky, it would be difficult to ascertain what measure of control or regulation that a State may lawfully exercise.

The case is one of a corporation created by the legislature of Kentucky, to build and operate a railroad in Kentucky, being controlled by the State of Kentucky, as to discriminations between localities in the same state, in the transportation of a product of the state, on a line of road wholly within the state. It may be true that the enforcement of this regulation may induce the managers of the road, in seeking to make as much profit as possible, to change to some extent their charges on interstate traffic: but their threat to do so, or even their actual change of interstate rates, cannot be a limitation upon the power of the state to regulate, for the benefit of the public within the state, the intra-state traffic with which Congress has no power to deal.

When there was question of prohibiting the purchase of a competing road, and the Interstate Commerce law was relied upon to invalidate another provision of the Kentucky Constitution, this court said: "All such regulations (police regulations) interfere indirectly, more or less, with commerce between the "states, in the fact that they impose a burden upon the instruments of such commerce, and add something to the cost of "transportation by the expense incurred in conforming to such "regulations." While it is true that the police power cannot be exercised "with respect to the commerce itself, it is not true "with respect to the instruments of such commerce.....It has "never been supposed that the dominant power of Congress "over interstate commerce took from the state the power of legislation with respect to the instruments of such commerce, so "far as legislation was within its ordinary police powers.....In "the division of authority with respect to interstate railways "Congress reserves to itself the superior right to control their "commerce and forbid interference therewith; while to the state "remains the power to create and to regulate the instruments "of such commerce, so far as necessary to the conservation of "the public interests." *L. & N. R. Co vs. Commonwealth of Kentucky, 161 U. S. 677.*

It was held in *Smyth vs Ames, 161 U. S. 466,* that a state might fix a schedule of rates to be charged on all intrastate traffic and that such regulation did not interfere with the Interstate Commerce law.

See also, *Hennington vs. Georgia,* 163 U. S. 299. *Osborne vs. Florida* 164 U. S. 650. *N. Y. & c R. Co. vs. New York,* 165 U. S. 628.

CHARTER CONTRACT.

The contention of Plaintiff in Error that it is exempt from legislative regulation by the state because of a supposed charter contract under which it has acquired the indefeasible right to exercise its own discretion in the management of its business, should be regarded as settled in the case of *L. & N. R. Co. vs. Commonwealth of Kentucky*, 161 U. S. 677, already cited. In that case there was question of power to prohibit the purchase of or consolidation with competing lines, while in the case at bar the question is as to the power of the state to prevent unjust discrimination between localities: the same reasoning applies to both cases.

However, since counsel for Plaintiff in Error have again presented the question, a due regard for them and for the court may demand a further consideration of the claim. *Stone, J. in Mobile &c., R. Co. vs. Stiner*, 61 *Ala.* 559, forcibly says:

"Railroads have so expedited and cheapened travel "and transportation, have so driven from their domain "all competing modes of transportation, that the public is left "no discretion but to employ them or suffer irreparable injury "in this age of steam and electricity. They have their estab- "lished rates of charge and these the shipper must pay or fore- "go all the facilities and benefits. To object or to protest "would be an idle waste of words, and the law looks to the "substance of things and does not require useless forms or cere- "monies. The corporation and the shipper are in no sense on "equal terms, and money thus paid to obtain a necessary ser- "vice is not voluntarily paid as the law interprets that phrase."

The citizen, then, would be completely at the mercy of a railroad corporation, if the legislature had the power, and at any time should assume to grant by contract to a railroad company the right to operate the public highway without interference from the State for the protection of the public.

If such an abandonment of the duty of protection on the part of the representatives of the State, can bind the State in its character as a sovereign, the citizens might soon find the powers of government bartered away from them by faithless agents, and held, under *inviolable contracts*, by corporations whose interests conflict with those of the public, their subjects.

The true principle under which alone the people can be secure in their property, and in their rights to life, liberty and the pursuit of happiness, rights that are inalienable, is that no set of representatives, selected by the people, at any time, to perform the duty of protecting those rights, and exercising the power of sovereignty, can delegate, by contract, that duty to others, nor cede the powers of sovereignty to individuals or corporations under any pretext, or for any consideration. The

police power is inherent in the people, and can not be bartered away without destroying the objects for which governments are organized. Whenever the protection of the public demands regulation of public agencies, the right and the power of legislating to that end exists. Representatives selected by the people to legislate for them were never entrusted with authority to destroy the power of the people to legislate for themselves, nor to transfer the power to irresponsible agencies.

In the *Lake Front cases, 146 U. S. 387*, Mr. Justice Field said: "The trust devolving upon the State for the public, and "which can only be discharged by the management and control "of property in which the public has an interest, can not be re- "linquished by a transfer of the property.... The State can no "more abdicate this trust over property in which the whole "people are interested than it can obdicate its police power in "the administration of government and the preservation of the "peace. In the administration of government the use of such pow- "ers may, for a limited period, be delegated to a municipality or "other body, *but there always remains with the state* the right to "revoke those powers and exercise them in a more direct man- "ner, and one more conformable to its wishes."

In *Georgia Railroad & Banking Co. vs. Smith, 128* U. S. *174*, Chief Justice Waite, in delivering the opinion of the Court, said: "So long as the use continues, the power of regulation "remains, and the regulation may extend, not merely to provis- "ions for the security of passengers and freight against acci- "dents and for the convenience of the public, but also to pre- "vent extortion by unreasonable charges, and favoritism by un- "just discrimination. This is not new doctrine, but *old doctrine, "always asserted whenever property or business is, by reason of "special privileges received from the government, the better to se- "cure the purpose to which the property is dedicated or devoted, affect- "ed with a public use.*" To the same affect, see *97 U. S. 25, 97 U. S 659, 101 U. S. 814, 161 U. S.* 677, *163 U. S. 299, 164* U. S *589, 164* U. S *650, 165* U. S. *628, 169 U.* S. *466.*

Whenever there has been claim of abandonment or abdication of the police power by reason of charter contract, this court has always found a sufficient answer to the claim by inspection of the words of the charter, and in every case thus far presented it has been held that the Legislature did not attempt to barter away the sovereignty of the State. It has not heretofore been necessary to the decision of any case for the court to go further than to say, as it did in *Stone vs. Farmers' Loan & Trust Co 116* U. S *307*, that "the power of regulation is a power of govern- "ment, *continuing in its nature, and if it can be bargained away "at all*, it can only be by words of positive grant, or something "which is in law equivalent;" in no case have there been found such "words of positive grant." It is not to be doubted

that should a case be presented in which a Legislature had attempted by "words of positive grant," to bargain away this "power of government, continuing in its nature," this court would be compelled by the settled principles of our government, to declare the attempt ineffective, as an exercise of power never delegated to the representatives of the people.

Whatever may be the provisions of the charter granted to Plaintiff in Error, there could not be a valid contract binding the State of Kentucky never to exercise its police power in regulating the use of the highway occupied by its railroad; but a proper construction of the charter will show that no such contract was ever attempted.

On March 5, 1850 the Louisville & Nashville Railroad Co., was incorporated for the "construction of a railroad from the city "of Louisville to the Tennessee line, in the direction of Nash-"ville," its capital stock was limited to $4,000,000.00: it was by §18 of the charter, granted "power to charge for tolls and the "transportation of persons, merchandise or property of any kind "whatever transported along said railway, any sum not exceeding "the following rates, to-wit: On all goods, merchandise or prop-"erty, for every one hundred pounds transported over 20 miles "and under 50 miles, 3½ mills for each mile; and for persons, "and every species of live stock, and every description of freight "or property, they shall charge no greater rate than is author-"ized to be charged on the railroad from Lexington to Frankfort."

By the 20th section of the act in-corporating the Lexington and Frankfort Railroad Company, approved Feby. 28, 1848, as amended by an act approved Feby. 26, 1849, that company had "power to charge for tolls and the transportation of persons, "goods, produce, merchandise, and property of any kind what-"ever transported by them along said railway between Lexington "and the Kentucky river *any sum* not exceeding the following "rates to-wit: For transportating any distance single packages "weighing less than 100 pounds, 25 cents, and at that rate "if such packages weigh more than 100 pounds; for transporting "goods, produce, merchandise or property of any kind. not more "than 4 mills per 100 pounds per mile; for transporting pass-"engers, not more than 4 cents per mile for each passenger with "his baggage, not weighing more than 40 pounds. But the "charge on coal shall at no time be fixed at a rate which shall "not yield a profit on its transportation." The Board of Directors were authorized to contract specially for the transportation of live stock, poultry and certain other enumerated articles, upon such terms as the parties interested might agree, not exceeding, save as to gold, silver bullion, money and nails, 15 per cent over the rates allowed for heavy merchandise or produce.

The charter of the Louisville & Nashville Railroad Com-

pany was amended six times before the general act of Feby. 14, 1857, reserving power to amend all charters and amendments thereafter granted. *Louisville Water Co. vs Clark*, 143 U. S. 1. *L & N. R. Co vs Commonwealth of Kentucky*, 161 U. S. 677.

On March 20, 1851. the Louisville & Nashville Railroad Co. was granted power to construct a branch road to the Mississippi river, and any other branch it might desire.

On Dec. 15, 1851, the Company was authorized to construct the main line of its road to the Mississippi river, or the Ohio below the Tennessee river or to connect with a road from Memphis, or with the Mobile and Ohio Railroad: and permission was granted to change the name to that of the "Louisville and South-estern Railroad Company."

On Jany. 9, 1852, authority was given to counties through which the road or its branches may pass, or any county contiguous thereto, to subscribe for capital stock in the Company.

On Feb. 24, 1854. an amendment provided for collecting taxes to pay county subscriptions of stock and, for representation of the city of Louisville and of subscribing counties in all elections of the Louisville & Nashville Railroad Company.

On March 7, 1854, the company was authorized to increase its capital stock to any amount not exceeding "the entire cost "of said road and its branches;" to redeem the bonds then issued, and to issue bonds under second mortgage to any amount not to "exceed one third the cost of said road and branches;" to "unite their road with any other road connecting therewith".

On Jan. 17. 1856. The Louisville & Nashville Railroad Company was authorized to issue bonds "to an amount not exceed-"ing three millions of dollars," and to execute a mortgage or deed of trust to secure their payment; no part of the money, thus raised, to be used "for any other purpose than that of con-"struction and equipment of the main stem of said road, con-"necting the city of Louisville with the city of Nashville." The company was authorized to guarantee the payment of interest and principal of county bonds delivered in payment of stock: to unite with any railroad company chartered in Tennessee for the construction of a bridge across the Cumberland river and useful conveniences for the transfer of passengers and freight from one road to another:

The Louisville & Nashville Railroad Company was authorized to issue bonds, "expressing on their face the purpose for "which they were executed," to obtain means to construct and equip any branch road; and all stock subscribed or means created to construct each separate branch should be faithfully applied to that purpose for the payment of these bonds the branch so procured should alone be liable: the rights, credits, property and profits

of each branch and of the main road were required to be kept in separate accounts, and could not be used or made liable for any or debts liability save of that portion to which they specially belonged.

The number of directors was increased from seven to nine, and the company authorized to make agreement for connection with any road chartered in Tennessee running part of the distance between Memphis & Louisville, to secure through transportation without change of cars or machinery between those cities, and "the said Louisville & Nashville Railroad Company "may in arranging a tariff of tolls, make discrimination on such "freight and travel as may run through from Louisville to "Memphis and from Memphis to Louisville, and such as may "run in part on their road, and transhipped to another." The Company was also authorized to extend any branch road, and purchase and hold any road constructed by another Company, and agree on terms "to receive the cars of other roads on "their said road, but shall charge for the same the usual freight."

Neither in the original charter, nor in any of the amendments prior to the general reservation statute of Feb. 14, 1856, is there any expression, even indirectly granting to the Louisville & Nashville Railroad Company, the privilege of discriminating in its tariff of tolls or charges in favor of longer over shorter distance points; no word indicating, in the slightest degree "a direct "contract with it exempting it from liability to future general leg- "islation in respect to" such discrimination, and it is well settled that, if it can be granted at all, "exemption from future general "legislation either by a constitutional provision or by an act of "the Legislature, can not be deemed to exist unless it is given "expressly, or unless it follows by an implication equally clear "with express words." *Pennsylvania Railroad Co vs. Miller, 132* U. S. 75.

The power conferred to charge for transportation, "*any sum* "not exceeding" certain named rates, did not justify discrimination in favor of longer over shorter distances; it is not necessary in this case to determine if the Legislature expressly abdicated the right of the State to fix a different maximm of tolls at a future time, under changed conditions of industry and commerce, but even that question should be regarded as settled against the company since the case of *Georgia Railroad and Banking Co. vs. Smith, 128* U. S. 174. That no charter provision was construed as authorizing discrimination between shippers oa localities on the main stem or any of its branches is clearly indicated by the expression found in Sec. 2 of the amendment of Jan. 17, 1856, authorizing discrimination, under certain circumstances, on the line between Louisville and Memphis alone.

After the enactment of the general reservation statute of Feb. 14,

1856, neither the Legislature of Kentucky nor Plaintiff in Error, believed that the Louisville & Nashville Railroad Company had authority, under any provision of its charter, to charge more for short than for longer distances, and when Plaintiff in Error determined that such discrimination might be of benefit to it, the Legislature was applied to for an amendment granting the privilege; the amendment was enacted Feb. 28, 1860, at the solicitation of the Company, and without any consideration to the State; it was simply a gratuity, a voluntary favor granted by the State to a favored corporation. By Sec. 1. of that amendment the Board of Directors were granted authority "in their "adjustment of a tariff for freight and passengers, to make dis- "crimination in favor of through freights and through passage, "and *in favor of freights and passage for long over short distances.*"

It will scarcely be contended that this amendment, enacted in 1860, four years after the general reservation statute, constituted an irrevocable contract on the part of the state, (*Louisville Water Co. vs. Clark, 143 U. S. 1. L. & N. R. R. Co. vs. Commonwealth of Ky., 161 U. S. 677*): and it is not credible that Plaintiff in Error would have solicited, or the legislature have expressly granted, with terms of more or less restriction, the privilege of doing something that was so essential in the business of conducting a railroad, that the state could not have forbidden it by a constitutional enactment.

Since the general reservation statute of 1856, the charter of the Louisville & Nashville Railroad Company has been amended not less than *twenty three* times by the legislature of Kentucky, in nearly every instance the amendment being applied for by the company. Under these various amendments, the separation of branch capital stock and branch indebtedness from that of the main line was abolished; the capital stock has been increased to at least fifty-five millions of dollars; immense issues of bonds have been placed upon the market, all restrictions as to the amount having been removed: large amount of stock in other railroads have been purchased: other companies have been consolidated with the Louisville and Nashville Company, while the original name has been retained: and now, instead of a struggling railroad company seeking to construct a road "extending from Louisville, in the direction of Nashville "to the Tennessee line," we find an immense corporation, owning and operating more than three thousand miles of railroad, paralleling the Ohio river, and spreading its web over the Southern States, from the Mississipi river to the Atlantic, from the Ohio river the Gulf of Mexico, and dominating the business of all that vast territory. It would require a violation of all just principles of construction to hold that privileges granted to the struggling infant of 1850-1856, may be retained and exercised, without the possibility of future legislative control, by

the giant of 1900, in all the new territory that it has added to its vast domain. While the name is the same, the Louisville & Nashville Railroad Company as it now exists is entirely different in every other particular from the corporation created in 1850–1856. Such consolidations with other companies, and acquisition of new lines of road have been held to create a new corporation, not possessing an immunity from taxation granted to the original company. *St. L. I. M. & S. R. R. Co.* vs. *Berry, et al, 113 U. S. 465-476. 8 Otto, 356-359. 5 Otto, 319-326.* In such cases there is not a merger of one into the other, nor a mere alliance or federation of the two. The charter amendment (Apr. 29, 1890) accepted and acted upon by the Company, authorized the Louisville & Nashville Railroad Company to consolidate with any other railroad company or companies whose road might connect with that of the Louisville & Nashville Railroad Company. The consolidation to be upon such terms as the companies may lawfully determine, and it "may "be so formed as to make the companies so consolidating *one* "railroad corporation or company, with a *consolidated stock and* "*property* and *one* board of directors to manage and control the "affairs thereof."

In *Atlantic & Gulf Railroad Co vs State of Georgia*, 8 *Otto*, *359—366*, two railroad companies were consolidated under provisions substantially identical with this amendment, the name of one of the original companies being retained, just as the name of the Louisville & Nashville Railroad Company has been retained after the various consolidations, by means of which the mileage owned and operated has been so largely increased. This court held that the effect of such consolidation was a new corporation, and that it was not a mere alliance or federation. "If it had been, each would have preserved its separate existence as well as its corperate name, but the act authorized the "consolidation of the two companies, thus making one capital "in place of two; it contemplated thereafter that the seperate "capital of each company should go out of existence, as the capital of that company, and if so, how could either have a continued separate being?.....The third section continued in "force the several immunities, franchises and privileges granted by the original charter and amendments, thereof, and the "liabilities therein imposed, but plainly for the benefit of the "consolidated companies."

RECAPITULATION.

To recapitulate, and condense the reasons urged against the contention of Plaintiff in Error, we submit that the judgment of the Court of Appeals of Kentucky must be affirmed:

1st. Because the long and short haul provision of the Constitution of Kentucky was enacted in the exercise of a power

vested in the State alone to prevent unjust discrimination between localities by railroad companies operating within the State; that it does not deprive Plaintiff in Error of the equal protection of the laws, because it applies alike to all railroads under similar circumstances; that it does not deprive any railroad of any part of its property, or of its legitimate earnings, but merely forbids a discrimination that the railroad companies could not lawfully make without express legislative authority; that the propriety of granting or withholding the right to discriminate in favor of long over short hauls is exclusively for the consideration of the legislative department and can not be controlled by the court.

2nd. Because no provision of the charter of the Louisville & Nashville Railroad Company purported to grant such right of discrimination until 1860, at which time the general reservation act of Feb. 14, 1856 was part of the charter, and the amendment of 1860 was, under that act, subject to repeal at any time; and that the amendment of 1860 was enacted at the instance of the Plaintiff in Error as a gratuitous concession, without any consideration.

3rd. Because, under no circumstances could the Legislature, by contract, abdicate or barter away the power of the State to legislate in the future to prevent unjust discrimination by common carriers, and

4th. Because, Sec. 218 of the Constitution of Kentucky does not interfere with interstate commerce, but merely prevents unjust discrimination between localities in the State, applying exclusively to intrastate traffic, and the instruments of commerce, over which Congress has no control. It is believed that the authorities presented conclusively sustain each of these several contentions, and an affirmance of the case is confidently asked.

Respectfully submitted,

H. W. RIVES,

For Defendent in Error.